STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2005
v	No. 247041 Wayne Circuit Court
ALVIN EUGENE ARNOLD, Defendant-Appellant.	LC No. 02-009455

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison for his first-degree murder conviction and two to five years' imprisonment for his felon in possession of a firearm conviction, to be served consecutive to two years' imprisonment for his felony-firearm conviction. We reverse and remand for a new trial.

I. Facts and Procedure

Defendant and Deirdre Davis were at the home of Lakisha Young[1] when Bruce Flemmon drove his car though the yard up to the doorsteps of Young's residence. Krystal Strong accompanied Flemmon as a passenger in his car. Young and Davis stepped out of the house, and Young told Flemmon, who was apparently drunk, to get out of her yard. Flemmon and Young got into an argument, which became heated. Young then went into her house, retrieved a shotgun, loaded it, went back outside, and again told Flemmon to leave. When Flemmon still refused to leave, Young fired the shotgun into the air two or three times.[2] Flemmon laughed and approached the porch where Young, Davis, and now defendant were standing. Defendant pushed Flemmon off the porch and the two argued. While continuing to argue with defendant,

[1] Young is Davis' sister and defendant's step-sister.

[2] Although Strong testified at trial that Young fired the shotgun into the air, she had previously told police that Young fired the shotgun once into the air, once at the ground at Flemmon's feet, and once toward the car that she was sitting in.

Flemmon began walking away from Young's house and toward the house next door, where his cousin, Derrick Burnette, lived. According to Young and Strong,[3] defendant took the shotgun from Young and approached Flemmon.[4] Young testified that defendant and Flemmon continued arguing on the sidewalk until defendant shot Flemmon with the shotgun, killing him.[5] Young picked up the shells from the shots she had fired and put them into a bag. Defendant took the bag and the shotgun and left. Young left for Georgia the next day.

At trial, Young was the only witness who identified defendant as the shooter. Strong's testimony was mostly consistent with Young's testimony, but Strong could only testify that the shooter was a man, without specifically identifying him as defendant. Defendant maintained his innocence at trial and argued that Young was the person who shot Flemmon. However, defendant did not present any witnesses or testify on his own behalf. The jury found defendant guilty as charged. On appeal, this Court remanded the matter to the trial court to conduct a *Ginther*[6] hearing to determine whether defendant had been denied effective assistance of counsel.[7] After taking testimony from several witnesses, the trial court concluded that defendant's trial counsel was ineffective for failing to secure Burnette as a witness for trial because Burnette would have testified that Strong told him right after the shooting that Young had committed the murder.

II. Analysis

Defendant argues that his trial counsel was ineffective for several reasons. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's findings of fact for clear error. MCR 2.613(C); MCR 6.001(D); *LeBlanc, supra* at 579. Questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that his attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668,

[3] Davis did not testify at trial.

[4] Strong could not identify defendant, but testified that a man took the shotgun from Young.

[5] Strong heard the shotgun blast, but did not see defendant actually shoot Flemmon.

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] *People v Arnold*, unpublished order of the Court of Appeals, entered June 14, 2004 (Docket No. 247041).

689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

Here, defendant argues, and the trial court agreed, that he is entitled to a new trial because his trial counsel was ineffective for failing to secure Burnette as a witness for trial. "The decision whether to call witnesses is a matter of trial strategy. In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 523 NW2d 830 (1994) (citation omitted).

At the *Ginther* hearing, Burnette testified that shortly after Flemmon was shot, Strong came to his house and frantically knocked on the door. When Burnette answered the door, Strong told him, "[T]hey just shot your cousin." Burnette asked, "[T]hey who?" Strong responded, "The big black girl next door." After the shooting, Burnette went to the police and made a statement that was consistent with his testimony at the *Ginther* hearing. After conducting the *Ginther* hearing, the trial court concluded that defendant's trial counsel was ineffective, concluding that counsel's efforts to locate Burnette were inadequate and that there was a reasonable possibility that Burnette's testimony, regarding Strong's statement to him that Young was the shooter, could have changed the outcome of the trial. We agree with the trial court.

First, we conclude that the trial court did not err in concluding that defendant's trial counsel's failure to locate or secure Burnette's presence for trial was below an objective standard of reasonableness under the prevailing professional norms. *Toma, supra* at 302. Despite counsel's knowledge of Burnette's statement to police and the importance of Burnette's testimony to defendant's theory of defense, counsel's attempts to locate Burnette were limited to two visits to Burnette's house before trial. Counsel never subpoenaed Burnette or asked the court or the prosecutor to help her find Burnette. Burnette testified that he had no reason not to testify at the trial, but he was never contacted by defense counsel. Counsel offered no excuse for failing to secure assistance in locating Burnette. Further, counsel offered no strategic reason why she did not call Burnette as a witness for trial. Counsel conceded that Burnette's testimony would have been helpful for the defense, and that Strong's statement to Burnette could have been admitted as an excited utterance under MRE 803(2). Counsel's lack of diligence in attempting to locate and secure Burnette's presence for trial did not fall within the range of reasonable professional assistance. *Strickland, supra* at 689; *Rockey, supra* at 76.

We also conclude that the trial court did not err in determining that defense counsel's failure to secure Burnette's presence at trial was so prejudicial to defendant that he was denied a fair trial. *Toma, supra* at 302. Defense counsel's theory of the case at trial was that Young was the actual murderer. However, defense counsel did not present any evidence or witnesses that supported this theory. Burnette's testimony that Strong told him that Young shot Flemmon

would have been the strongest evidence supporting the defense theory that Young was the murderer. Thus, Burnette's testimony was critical to the defense.

Burnette's description of Strong's emotional state shows that Strong's statement would have qualified for admission as an excited utterance under MRE 803(2). Burnette testified at the *Ginther* hearing that Strong was frantic and acted as if someone was chasing her. When Strong made her statement, Flemmon's body was on the ground about fifteen to twenty feet away, between the sidewalk and the curb. Because Strong's statement was made while she was under the stress of the excitement caused by the shooting, it qualified for admission under MRE 803(2).

Although Burnette's testimony would not have conclusively established Young as the shooter, there is a reasonable probability that Strong's statement, made immediately after the shooting and while under the stress caused by the shooting, could have created a reasonable doubt regarding defendant's guilt. Other evidence submitted at trial supported an inference that Young was the shooter. For example, Young loaded the shotgun, possessed it during a portion of her argument with Flemmon, and discharged it two or three times. Although Young testified that she shot the shotgun into the air, Strong told police that Young had fired the shotgun once into the air, once at the ground at Flemmon's feet, and once toward the car in which she was sitting. Young was the only person at trial who identified defendant as the shooter and who saw the actual shooting. After Flemmon was shot, Young collected the shotgun shells and put them in a bag. She left for Georgia the next day without calling the police. Further, Burnette revealed at the *Ginther* hearing that Flemmon was Young's ex-boyfriend and that the two had been through a contentious breakup. Young admitted at trial that before the shooting, she had on multiple occasions filed police reports against Flemmon, who often went to her house while he was intoxicated and had once tried to break into her house. Defendant, on the other hand, indicated at the *Ginther* hearing that he did not know Flemmon, had never spoken to him, and had no hostility toward him. In light of the paucity of objective evidence of defendant's guilt submitted at trial and the importance of Burnette's testimony to defendant's theory at trial, we conclude that counsel's failure to secure Burnette's presence at trial undermines confidence in the outcome of the trial. *Carbin*, *supra* at 600. Therefore, defendant's trial counsel was ineffective and defendant is entitled to a new trial.[8]

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

[8] In addition to failing to file a brief responding to defendant's argument that he was denied the effective assistance of counsel, the prosecutor waived oral argument. A prosecutor has an obligation to either argue the merits of the case or, in the interests of justice and judicial economy, concede error. Here, the prosecutor failed to do either.